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Torts - Malpractice - Medicolegal Relations - Expert Testimony

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COMMENT

TORTS—MALPRACTICE— MEDICOLEGAL RELATIONS— EXPERT TESTIMONY.

The place of expert opinion evidence in our adversary system has been firmly established. Evidence of this type, while often a substantial aid to the attainment of justice, has not escaped criticism.[1] The expert most frequently employed, the medical expert,[2] has often been the target of this criticism.[3] While expert medical testimony may be important in a great variety of cases, it is frequently an absolute necessity in a malpractice action against a physician.[4] Absent such testimony the plaintiff runs the grave risk of a nonsuit. This necessity, coupled with the increase in malpractice actions against physicians in recent years,[5] has focused the attention of both the medical and legal professions on this problem.

It is beyond the scope of this Comment to discuss the entire field of expert medical testimony. Rather it will be limited to a discussion of the physician's standard of care; the method of proving it; and specifically, the availability of expert medical testimony in malpractice actions against members of the medical profession.

I.

THE PHYSICIAN'S STANDARD OF CARE.

A physician is not a guarantor of cures [6] and thus is not liable for an unfortunate result. If this were the case every tombstone would be the

1. Martin v. Courtney, 75 Minn. 255, 77 N.W. 813 (1899); 6 WIGMORE, EVIDENCE, § 1692 (3d ed. 1940).

2. 1 BELLI, MODERN TRIALS § 59 (1954).

3. Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rule of Evidence*, 10 U. OF CHI. L. R. 285, 292, 293 (1943).

4. Ewing v. Goode, 78 Fed. 442 (W.D. Ohio 1897); Howell v. Jackson, 65 Ga. App. 422, 16 S.E.2d 45 (1941); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944); Bierstein v. Whitman, 360 Pa. 537, 62 A.2d 843 (1949); Cochran v. Harrison Memorial Hosp., 42 Wash. 2d 264, 254 P.2d 752 (1953); Pettigrew v. Lewis, 46 Kan. 78, 26 Pac. 458 (1891).

5. 3 BELLI, MODERN TRIALS, § 327 (1954); REGAN, DOCTOR AND PATIENT AND THE LAW, 9 (2d ed. 1949); Note, 26 VA. L. REV. 919 (1940).

6. Ewing v. Goode, 78 Fed. 442 (W.D. Ohio 1897); Josselyn v. Dearborn, 144 Me. 47, 62 A.2d 174 (1948); Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); MacKenzie v. Carman, 103 App. Div. 246, 92 N.Y. Supp. 1063 (1st Dep't 1905).

basis for a malpractice action.[7] However, a physician may assume this liability by express contract.[8]

Quite generally it is stated that a physician in accepting a patient for treatment [9] must exercise that degree of skill and learning which is normal to the average member of the profession.[10] Obviously the above statement, standing alone, has very little meaning. To give it a fuller meaning we must answer the question—who is the average member of the profession? In answering this question the courts have divided into two camps. Some courts have said that the defendant-physician's standard of care is to be measured by the skill and learning of the average physician in *his own* particular community or locality.[11] Other courts have said that the physician must exercise the skill and learning of the physicians in his own particular locality, *or in a similar locality.*[12]

The distinction arising from a literal interpretation of these two statements is obvious. However, as pointed out by Justice Edmonds in the case of *Sinz v. Owens*, "emphasis on strict interpretation of either statement of the rule in this regard tends to obscure the sole purpose which justifies it."[13] The justification for such a rule is that:

> "a doctor in a small community or village, not having the same opportunity and resources for keeping abreast of the advances in his profession should not be held to the same standard of skill and care as that employed by physicians and surgeons in the large cities."[14]

The absurdity of a too legalistic interpretation of the rule, particularly today, is further emphasized in the case of *Tvedt v. Haugen* where the court stated:

> "The duty of a doctor to his patients is measured by conditions as they exist and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the

7. Regan, *Malpractice is Your Problem,* 6 GENERAL PRACTICAL CLINICS 600 (1949).

8. Lake v. Baccus, 59 Ga. App. 656, 2 S.E.2d 121 (1939); Keating v. Perkins, 250 App. Div. 9, 293 N.Y. Supp. 197 (1st Dep't 1937); Schuster v. Sutherland, 92 Wash. 135, 174 P.2d 755 (1916).

9. McNamara v. Emmons, 36 Cal. App. 2d 199, 97 P.2d 503 (1940); Buttersworth v. Swint, 53 Ga. App. 602, 186 S.E. 770 (1936); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901); 3 BELLI, MODERN TRIALS § 334 (1954).

10. RESTATEMENT, TORTS § 299, comment d (1934).

11. Stallcup v. Coscarart, 79 Ariz. 42, 282 P.2d 791 (1955); Trindle v. Wheeler, 23 Cal. 2d 330, 143 P.2d 932 (1943); Schiveson v. Walsh, 354 Ill. 40, 187 N.E. 921 (1933); Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952).

12. Thomason v. Hethcock, 7 Cal. App. 2d 634, 46 P.2d 832 (1935); Czajka v. Sadowski, 243 Mich. 21, 219 N.W. 660 (1928); Forthoffer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

13. 33 Cal. 2d 749, 205 P.2d 3, 6 (1949).

14. Warnock v. Kraft, 30 Cal. App. 2d 1, 3, 85 P.2d 505, 506 (1938); Gist v. French, 288 P.2d 1003 (Cal. 1955).

> duty of a doctor is not fulfilled merely by utilizing the means at hand in a particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have in effect been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of his limited facilities or training, is unable to give." [15]

In establishing the physician's standard of care it is important to note that the standard, like the reasonable man standard of general negligence law, is relative, i.e., it applies to specialists in a different degree than it does to general practictioners. Thus a specialist is bound to exercise that degree of skill and learning which is normal to the average specialist in his community or similar communities.[16] In spite of this, however, it has been held that a general practictioner can testify against a specialist in a malpractice case, with the factor of non-specialization going only to the weight of the evidence.[17]

Finally, it should be noted that the standard of care required of a doctor is not a universal standard applicable to all physicians alike. A doctor is entitled to have his treatment judged by the standards of the school of medicine to which he belongs.[18] Thus on this basis it has been held proper to exclude the expert testimony of an osteopath in a malpractice action against a medical doctor.[19] However, where both schools follow the same method of treatment the osteopath may testify against the medical doctor.[20]

II.

PROVING THE STANDARD.

What evidence can and must be introduced by the plaintiff for the court to ascertain the standard of care which a physician must exercise?

The general rule in most malpractice actions against physicians is that expert opinion evidence is absolutely necessary in order for the plaintiff to carry his burden of proof.[21] The reason for the existence of such a rule is well stated by Justice Safford, of the Supreme Court of Kansas:

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15. 70 N.D. 338, 294 N.W. 183, 188 (1940).

16. Carbone v. Warburton, 22 N.J. Super. 5, 91 A.2d 518 (1952), *aff'd,* 94 A.2d 680 (N.J. 1953); RESTATEMENT, TORTS § 299, comment d (1934).

17. Pridgen v. Gibson, 194 N.C. 289, 139 S.E. 443 (1927); Hunter v. Burroughs, 123 Va. 133, 96 S.E. 360 (1918).

18. Burkholtz v. Benepe, 153 Minn. 335, 190 N.W. 800 (1922); Forthoffer v. Arnold, 60 Ohio App. 436, 21 N.E. 2d 869 (1938).

19. Martin v. Cortney, 75 Minn. 255, 77 N.W. 813 (1899); See also Forthoffer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

20. Cook v. Moats, 121 Neb. 769, 238 N.W. 529 (1931); Morrill v. Komasinski, 256 Wis. 417, 41 N.W.2d 620 (1950).

21. Haliburton v. General Hosp. Soc'y, 131 Conn. 61, 48 A.2d 61 (1946); Berkson v. Chandler, 5 Ill. App. 2d 583, 136 N.E.2d 389 (1955); Yates v. Gamble, 198 Minn. 7, 268 N.W. 670 (1936); See note 4 *supra.*

"This evidence must from the very nature of the case, come from experts, as other witnesses are not competent to give it, nor are juries supposed to be conversant with what is peculiar to the science and practice of the professions of medicine and surgery to that degree that will enable them to dispense with all explanations."[22]

However, as is true of almost every rule of evidence, there are exeptions to the above requirement of expert testimony. Where the propriety of the treatment is a matter of common knowledge, no expert testimony is required.[23] Some courts have justified this ruling by applying the doctrine of res ipsa loquitur.[24] In addition to this general exception, certain specific types of cases have been recognized as not requiring expert testimony. These may be classified as follows.

A.

Injury to a Separate Part of the Body.

In cases where the part of the body which is injured is a part which is not being treated or is removed from the area of treatment it has been held that expert testimony is not necessary.[25]

B.

Sponge Cases.

This class includes those cases in which a surgeon leaves a sponge or other surgical instrument inside a patient's body during the performance of an operation. No expert testimony has been required in cases such as these.[26]

C.

X-Ray Cases.

In cases involving the use of X-rays or, more correctly, the failure of the physician to take X-rays, it has been held that expert testimony is not necessary.[27] In addition to holding that expert testimony is not necessary

22. Tefft v. Wilcox, 6 Kan. 33, 40 (1870).

23. Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953); Dean v. Dyer, 64 Cal. App. 2d 646, 149 P.2d 288 (1944); Covington v. James, 214 N.C. 71, 197 S.E. 701 (1938).

24. Oldis v. La Societe Francaise De Bienfaisance Mutuelle, 279 P.2d 184 (Cal. 1955); Pendergraft v. Royster, 203 N.C. 384, 166 S.E. 285 (1932).

25. Vergeldt v. Hartzell, 1 F.2d 633 (8th Cir. 1924); Thomsen v. Burgeson, 26 Cal. App. 2d 235, 79 P.2d 136 (1938); Evans v. Roberts, 172 Iowa 653, 154 N.W. 923 (1915); Steinke v. Bell, 32 N.J. Super. 67, 107 A.2d 825 (1954); Marlowe v. Patrick, 181 Wash. 647, 44 P.2d 776 (1935).

26. Tiller v. Von Pohle, 72 Ariz. 11, 230 P.2d 213 (1951); Funk v. Bonham, 204 Ind. 170, 183 N.E. 312 (1932); Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941); Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007 (1913).

27. Howell v. Jackson, 65 Ga. App. 422, 16 S.E.2d 45 (1941); James v. Grigsby, 114 Kan. 627, 220 Pac. 267 (1923).

one court has held that the failure to take X-rays in a case where there is a possible fracture may be judicially noticed by the court.[28] Furthermore, in a recent Nevada case it has been held that "without expert medical testimony, a jury might, from its own common knowledge and experience recognize the use of biopsy or pathological examination and microscopic analysis of tissue as a common and accepted diagnostic practice in determining the presence or absence of cancer." [29]

III.

THE PLAINTIFF'S PROBLEM IN OBTAINING EXPERT TESTIMONY IN MALPRACTICE CASES.

What is the position of the plaintiff in actions requiring expert medical testimony? Generally he must produce a medical expert or run the risk of a nonsuit. Thus the question becomes in essence whether expert medical testimony is available to plaintiffs in malpractice actions against members of the medical profession.

There has been much discussion in recent years in the cases, the law reviews, and the medical journals, concerning the "well known reluctance" of members of the medical profession to testify against each other in malpractice actions.[30]

The recent case of *Steiginga v. Thron* [31] is a good illustration of the problem. Other than the fact that it was a malpractice claim against an obstetrician the particular facts of the case are unimportant. What is important is that while the trial was scheduled to begin on a Monday, on the preceding Saturday the plaintiff's only expert witness

> "without warrant and without further notice, declined on 'second thought' to testify against a 'brother practitioner'. This, even though, as it is said, he then reiterated the aspects wherein the defendant was negligent." [32]

The plaintiff's attorney sought an adjournment on these grounds. The adjournment was denied. An appeal was taken and the New Jersey Superior Court reversed the trial court and held that the adjournment should have been granted. Justice Clapp in his opinion condemned the medical profession for "a shocking unethical reluctance on the part of the medical profession to accept its obligation to society and its profession in an action for malpractice." [33] The court also noted that at the time the case was dis-

28. Agnew v. Los Angeles, 82 Cal. App. 2d 616, 186 P.2d 450 (1947).

29. Corn v. French, 289 P.2d 173, 179 (Nev. 1955).

30. Gist v. French, 288 P.2d 1003 (Cal. 1955); Johnson v. Winston, 68 Neb. 425, 94 N.W. 607 (1903); Hall, *The Physician and the Law*, 158 A.M.A.J. 257 (1955); 10 NACCA L. J. 256 (1952); Note, 1952 WIS. L. REV. 567.

31. 30 N.J. Super. 423, 105 A.2d 10 (1954).

32. *Id.* at 11.

33. *Ibid.*

missed it was the second oldest on the trial calendar, and had been set down for trial eleven times, five times peremptorily.

Justice Carter, dissenting in the case of *Huffman v. Lindquist*,[34] reiterated the sentiments expressed by the New Jersey court when he said:

> "Any one familiar with cases of this character knows that the so-called ethical practitioner will not testify on behalf of the plaintiff regardless of the merits of the case."

The case of *Paulsen v. Gundersen* [35] illustrates the method by which Wisconsin has attempted to handle the problem. In this case a medical doctor from Des Moines, Iowa, was permitted to testify for the plaintiff when the plaintiff showed "that he took adequate steps to secure the aid of Wisconsin doctors and that he has been unable to secure it."[36] This was permitted under a Wisconsin statute [37] which stated:

> "Practitioners in medicine, surgery or osteopathy licensed in other states may testify as experts in this state when such testimony is necessary to establish the rights of citizens or residents of this state in a judicial proceeding and expert testimony, of licensed practitioners of this state sufficient for the purpose, is not available."

A more recent Wisconsin case allowed the plaintiff to call as an expert witness an osteopathic surgeon licensed to practice in Michigan in an action against a medical doctor.[38] The court permitted this to be done pursuant to the above mentioned statute when it was shown that "the plaintiff and her counsel consulted six or seven physicians and surgeons licensed in Wisconsin and were advised that the diagnosis and treatment accorded the plaintiff by the defendants were faulty but that they would not appear and testify." [39]

Perhaps the most vivid illustration of the problem, particularly for the practicing attorney, is a case involving Melvin M. Belli, the well-known claimant's attorney.[40] A lawyer in Mr. Belli's firm filed suit for the plaintiff principally to prevent the running of the statute of limitations. The case involved a diabetic upon whose foot the defendant doctor had knowingly performed surgery. Eventually the leg had to be amputated. In bringing suit the patient's attorney was unable to obtain expert testimony. Actually the experts were probably correct in refusing to testify as "subsequent research in the law revealed that there were many cases approving

34. 37 Cal. 2d 465, 234 P.2d 34, 46 (1951) (dissenting opinion).
35. 218 Wis. 578, 260 N.W. 448 (1935).
36. *Id.* at 451.
37. WIS. STAT. § 147.14 (2) (1951).
38. Morrill v. Komasinski, 256 Wis. 417, 41 N.W.2d 620 (1950).
39. *Id.* at 622, 623.
40. Handerkin v. Belli (1952) San Rafael, Cal.; See 3 BELLI, MODERN TRIALS, § 352 (1954); 11 NACCA L. J. 255 (1953).

calculated risk for surgery on diabetics."[41] The case was dismissed after one continuance.

The dissatisfied plaintiff, in an unusual turnabout, sued Mr. Belli's firm for legal malpractice in failing to produce an expert. At the trial the plaintiff's new lawyer called a physician who "sanctimoniously" said he would testify in a "justiciable" malpractice case.[42] A verdict of $33,000 resulted against Mr. Belli's firm.

Although there are statements to the contrary[43] it cannot be denied that the "general reluctance" of members of the medical profession to testify against each other in malpractice actions is a fact sufficiently established so as to warrant further discussion.

IV.

THE REASONS FOR THE RELUCTANCE OF PHYSICIANS TO TESTIFY.

The first question posed is why this reluctance? Because of the subjective element involved there are probably as many reasons for the reluctance of physicians to testify as there are physicians and it would be impossible to treat all of them.

Accordingly, this Comment will present only the more frequently mentioned reasons[44] and a discussion of their validity. It has been suggested that physicians just don't like to appear in court in any type of action, not only malpractice cases. Consequently, some of the reasons to be given here for the reluctance of physicians to testify apply generally to all law suits and are not restricted to malpractice actions. However, these general reasons will be treated only in so far as they apply to malpractice actions.

The reason which is most frequently cited for a physician's reluctance to testify is that there is too much time wasted in waiting around the courtroom while lawyers argue over technicalities and that this is time wasted at the expense of the doctor's other patients.[45] In rebuttal it has been argued that physicians are not the only witnesses who must await their turn in court. Certainly the time wasted by any individual is valuable time lost which he could use in the pursuit of his occupation. Should the physicians be given preference over any other witnesses?

Perhaps there is a valid reason for giving preference to physicians as witnesses in court. The physician is the guardian of the physical and mental health of the community. This is a uniquely responsible position. Therefore,

41. 3 BELLI, MODERN TRIALS § 352 (1954).

42. 11 NACCA L. J. 255 (1953).

43. Coleman v. McCarthy, 53 R.I. 266, 165 Atl. 900 (1933) (dictum).

44. Some of the reasons presented here were obtained in an unscientific poll conducted by the author among a small number of physicians practicing in the Philadelphia area. The questionnaires were answered anonymously and are on file in the office of the Villanova Law Review.

45. See note 44 *supra;* Hall, *The Physician and the Law,* 158 A.M.A.J. 257 (1955).

perhaps it is true that the physician's time is objectively more valuable, not to himself in pursuit of his occupation, but to society as a whole.

However, it should also be noted that this excuse may not be justified in all cases. An article in the Maryland Law Review [46] takes issue with the doctor's complaint about the loss of time saying that "to a very great extent, this has been eliminated and can be improved even further if counsel are competent and judges cooperate, as they invariably do."

Another oft-repeated complaint is that physicians are at the mercy of lawyers when they are on the stand and can be made to look foolish on cross-examination.[47] The quite obvious answer to this argument is that they are not the only witnesses who are at the mercy of the lawyer. Certainly all witnesses would prefer to have their word taken at face value without cross-examination. If a physician is made to look foolish on cross-examination it is probably the result of inadequate preparation by the physician and the plaintiff's counsel.[48] If the plaintiff's counsel apprises the expert witness of what he is to testify and the physician prepares himself on that topic it would appear that the physician would be able to "hold his own" in a verbal duel with an attorney on medical topics.

It has also been argued that the reluctance of physicians to testify is merely a matter of professional courtesy and this attitude is to be found among the members of any profession.[49] This professional courtesy may be intensified by actual friendship and by the "intensely personal atmosphere of a malpractic situation. There, but for the Grace of God, go I."[50]

Perhaps this professional courtesy does exist among the members of any profession. That question will not be discussed here. The key to the problem at hand may lie in the words "intensely personal atmosphere of a malpractice situation." Should the atmosphere be so "intensely personal"? The following statement by H. W. Smith, presently the head of the Law-Science Institute at the University of Texas, will serve to shed some much needed light on this situation. Mr. Smith says:

> "the very purpose of the courts is to settle such disputes as fairly as possible. The purse-sparing propaganda that a physician must fight every malpractice claim to save the 'honor' of the medical profession has clouded clear thinking . . . . The ordinary case of civil malpractice does not involve moral turpitude but it is an action seeking compensatory damages for simple negligence; every case is not an 'indictment' of the medical profession which calls for the cooperation of all good practitioners in saving the common honor whatever the merits of the claim."[51]

46. Coughlan, *The Doctor in Court—Expert Medical Testimony—A Symposium —Viewpoint of Trial Counsel,* 13 MD. L. REV. 285, 290 (1953).
47. See note 44 *supra;* Hall, *The Physician and the Law,* 158 A.M.A.J. 257 (1955).
48. 159 A.M.A.J. 1638 (1955).
49. See note 44 *supra;* 3 BELLI, MODERN TRIALS § 327 (1954).
50. Hall, *Let's Understand Each Other,* 42 ILL. B. J. 690 (1954).
51. Smith, *Malpractice,* 116 A.M.A.J. 2670, 2676 (1941).

It is further argued that a malpractice action is different from the ordinary civil suit, in that the doctor's professional reputation is at stake.[52] Such an argument can not be denied and in fact the law fully recognizes it. The Supreme Court of Florida has said that:

> "In cases arising from charges of malpractice, the sum of money involved, regardless of its size, is a mere gesture in comparison with the professional character and reputation of the defendant. He should not therefore be condemned on evidence that does not point conclusively to his negligence." [53]

Such an argument carries much weight. However, this feature of a malpractice action is not unique. Any law suit does, to some extent, involve the reputation and character of the defendant. This is particularly true in suits involving breach of warranty against a corporation, involving foods for human consumption.

Another reason suggested for the reluctance of physicians to testify in malpractice actions is the pressure from medical societies and the public liability insurance companies which issue malpractice policies.[54] It has been said that a physician in testifying for a plaintiff in a malpractice action "runs the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance." [55] Charges such as this are quite serious. While the evidence in support of such charges does not appear to be conclusive suspicion of such a result would certainly provide a forceful deterrent to a physician's testifying in a malpractice action against a fellow practitioner.

Quite seriously it has been charged that the code of ethics of the medical profession requires physicians not to testify against each other.[56] This charge has been categorically denied by the medical profession.[57] Certainly the written code of medical ethics gives no indication of the truth of these charges. To the contrary, that code provides that "a physician should expose, without fear or favor, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession." [58] The whole tenor of the code of medical ethics seems to provide a basis for the wholehearted cooperation of the medical and legal professions in enforcing the laws regulating the practice of medicine.[59]

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52. See note 44 *supra.*
53. Foster v. Thornton, 125 Fla. 699, 170 So. 459, 463 (1936).
54. McHugh v. Audet, 72 F. Supp. 394 (M.D. Pa. 1947); Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34 (1951) (dissenting opinion); 3 BELLI, MODERN TRIALS § 327 (1954).
55. Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34, 46 (1951).
56. Daly v. Lininger, 87 Colo. 401, 288 Pac. 633 (1930); Tadlock v. Lloyd, 65 Colo. 40, 173 Pac. 200 (1918).
57. CHRISTIE, ECONOMIC PROBLEMS OF MEDICINE, 13-15 (1935); Hall, *Let's Understand Each Other,* 42 ILL. B. J. 690 (1954).
58. PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION, chap. 3, sec. 4 (1954).
59. *Ibid;* See also chap. 1, sec. 11; chap. 3, sec. 3; chap. 8, sec. 1.

It has also been argued that physicians refuse to testify because of the lack of opportunity to know all the facts of the situation.[60] It is quite clear that this may reflect on the preparation of the case by the attorney. Certainly an atttorney should realize that before a doctor can testify he must have knowledge of all the pertinent facts. The position of the expert witness for the plaintiff in relation to the defendant-physician might well be compared to the position of the appellate court in reviewing a case on appeal. Appellate courts frequently speak of "the superior position enjoyed by the trial judge over that of the appellate court." [61] The New Jersey Supreme Court in speaking on this point has said of the trial judge, "He sees and hears the witnesses, observes their demeanor and reactions, none of which has life in the record on appeal. He is in a position to know and equate all the factors." [62]

The expert witness gives his testimony in response to hypothetical questions. He has not seen or heard the patient during the course of the allegedly negligent treatment. He has not observed the patient's demeanor or reaction to this treatment. These factors plus his awareness of the recent advances in the field of psychosomatic medicine and the importance of the mental state of the patient as a factor in recovery make his position all the more difficult. A recognition of this position in which the expert finds himself should lead the plaintiff's attorney to make a special effort to see that all the pertinent facts are made available to the expert before placing him on the witness stand. Conversely, the physician's awareness of this difficulty should lead him to request the plaintiff's attorney to elicit further facts if those presented to him are inadequate.

Another reason suggested for the physician's reluctance to testify is that physicians feel as though they will be forced to show the fruits of their training without compensation.[63] This reason also reflects on the attorney's preparation of the case. The physician should be made aware, as soon as he is contacted about testifying, that it is perfectly proper to pay a reasonable fee to an expert witness to compensate him for the time and expense incurred in coming to court to testify.

Another reason frequently mentioned is that the physician is entirely out of his element in the strange atmosphere of the courtroom.[64] The truth of this statement is not to be denied; however, this is also true of almost any person who is called to court to testify.

Further reasons suggested are that the physicians feel as though they will get into trouble for revealing confidential information [65] and that there is a "very basic difference in the method of approach of the law and medi-

60. See note 44 *supra.*
61. Ruth v. Fenchel, 117 A.2d 284, 289 (N.J. 1955).
62. Hartpence v. Grouleff, 15 N.J. 545, 549, 105 A.2d 514, 516 (1954).
63. Hall, *The Physician and the Law,* 158 A.M.A.J. 257 (1955).
64. Hall, *Let's Understand Each Other,* 42 ILL. B. J. 690 (1954).
65. Hall, *The Physician and the Law,* 158 A.M.A.J. 257 (1955).

cine in so far as the discovery of truth is concerned." [66] Both of these reasons together with some of the others previously mentioned seem to strike the keynote of the problem. The glaring weakness inherent in all the reasons given for the reluctance to testify is that physicians and attorneys simply do not understand each other. This is brought home quite vividly in an article by Sidney Shindell, who is both an attorney and a physician, appearing in the Journal of the American Medical Association in which he says, "perhaps much of the difficulty results from a lack of appreciation, on the part of physicians and attorneys alike, of the problems of the other profession." [67]

With this thought in mind our final inquiry is what is being done and what should be done to solve the problem faced by the plaintiff in these actions?

V.

WHAT HAS BEEN DONE?

A.

By the Professions Themselves.

Our first inquiry will be into what has been done by the medical and legal professions themselves, through the American Medical Association, county medical societies and bar associations to alleviate this problem?

Mr. Shindell, in the article previously referred to, after suggesting the use of joint physician-lawyer boards to make preliminary investigations before the institution of legal proceedings says:

> "because of the importance of the question the only feasible recommendation at this time is for serious consideration of these proposals. If leaders of both professions, representatives of insurance companies, members of the judiciary, specialists in academic fields involved and representatives of the public all were to consult on this matter, a satisfactory solution could be evolved." [68]

Apparently, the medical and legal professions have heeded this advice. The Law Department and the Committee on Medicolegal Problems of the American Medical Association recently sponsored a series of medicolegal symposiums.[69] They were held in Omaha, Chicago, and New York City. Problems discussed at these meetings included: "medicine's contributions to the administration of justice"; "mutual medicolegal problems as viewed by each profession"; and "a demonstration showing a medical expert witness under proper and improper courtroom conditions." [70]

66. Hall, *Let's Understand Each Other,* 42 ILL. B. J. 690 (1954).

67. Shindell, *Medicine v. Law: A Proposal for Settlement,* 151 A.M.A.J. 1078 (1953).

68. *Id.* at 1080.

69. 159 A.M.A.J. 1638 (1955).

70. *Ibid.*

The medical profession has also established grievance committees for the hearing of complaints against members of the profession. By January 1953, all of the states and the District of Columbia had some form of grievance committee in operation to hear public complaints.[71] While these committees may serve a very useful purpose in screening out obviously false claims, they have not escaped criticism. Two of the chief complaints voiced by members of the bar are that attorneys are not permitted to sit on these committees and secondly, that if the committee decides there is no negligence then the difficult task of getting a physician to testify is made impossible.

Attempts are being made to make greater use of the neutral medical expert in civil trials. Such a plan was recently introduced in Baltimore at the suggestion of a joint committee of the Maryland Bar and Medical Societies.[72] These plans have been criticized as usurpations of the jury function and as establishing a one-man jury,[73] however, they have also met with some approval.[74]

The final, and probably the most noteworthy step is the establishment of medicolegal organizations to foster better relations between the two professions. An example of the progress which is being made in this area is the establishment of the Louisville Law-Science Foundation, Inc. in Louisville, Kentucky.[75] A similar organization has recently been formed in Philadelphia.[76]

B.

By the Judiciary.

Secondly, we should examine what is being done by the courts to help alleviate this problem. Cases in which the courts have recognized the difficulty are numerous.[77] A 1903 Nebraska case seems to have set the pattern for one method by which the courts have aided plaintiffs in their actions against physicians. In that case the Nebraska Supreme Court, in reversing the trial court for excluding the testimony of the plaintiff's only expert witness, said:

71. Hall, *Let's Understand Each Other,* 42 ILL. B. J. 690 (1954). For an interesting account of the establishment and operation of a grievance committee by the Alemeda County Medical Association, see Silverman, *The Doctors Who Crack Down on Doctors,* 150 PHILA. MEDICINE 1012 (1955).

72. Guttmacher, *Why Psychiatrists Do Not Like to Testify in Court,* 5 PRACTICAL LAWYER 50 (1955).

73. *Id.* at 53.

74. *Id.* at 53; Coleman v. McCarthy, 53 R.I. 266, 165 Atl. 900 (1933).

75. KY. REV. STAT. §§ 273.160 to 273.190 (1955).

76. Eldredge and Hadden, *Philadelphia Medico-Legal Institute,* 18 THE SHINGLE (Philadelphia Bar Association Publication) 195 (1955).

77. Gist v. French, 288 P.2d 1003 (Cal. 1955); Tadlock v. Lloyd, 65 Colo. 40, 173 Pac. 200 (1918); Daly v. Lininger, 87 Colo. 401, 288 Pac. 632 (1930); Slimak v. Foster, 106 Conn. 366, 138 Atl. 153 (1927); Johnson v. Winston, 68 Neb. 425, 94 N.W. 607 (1903); Beane v. Perley, 109 A.2d 848 (N.H. 1954); Steiginga v. Thron, 30 N.J. Super. 423, 105 A.2d 10 (1954); Edwards v. Clark, 96 Utah 1021, 83 P.2d 1021 (1938); Morrill v. Komasinski, 256 Wis. 417, 41 N.W. 2d 620 (1950); Paulsen v. Gundersen, 218 Wis. 578, 260 N.W. 448 (1935).

> "We cannot overlook the well-known fact that in actions of this kind it is always difficult to obtain professional testimony. It will not do to lay down the rule that only professional witnesses can be heard on questions of this character, and then, in spite of the fact that they are often unwilling, apply the rules of evidence with such stringency that their testimony cannot be obtained against one of their own members."[78]

The courts in following the lead of the Nebraska Supreme Court have thus been inclined to be liberal in making some sort of expert testimony available to the plaintiff. Thus we find some courts holding that the amount of expert testimony required may be conditioned upon the unwillingness of the members of the medical profession to testify against each other.[79] On this the Supreme Court of Connecticut said:

> "We are unable to agree with the trial court that the plaintiff's evidence was necessarily so lacking in the expert testimony required by the rule as to thereby defeat his recovery. To be sure, there was no specific expression of opinion that the conduct of the defendant was negligent or unskillful, the expert witnesses being manifestly and naturally cautious in characterization in the absence of more exact information as to the precise conditions obtaining at the time of the operation than could be afforded by the plaintiff. This must of necessity be true in many cases, and to demand a positive condemnation of the operators course as a prerequisite to recovery would, in such cases bar any recovery thereon."[80]

The California courts, in order to prevent the plaintiff from being nonsuited, have used another means to furnish him with expert testimony. The means they have employed is the defendant physician himself. Thus the California Supreme Court has held that under sec. 2055 of the California Code the plaintiff in a malpractice action may require the defendant to testify as an expert and thus make out a prima facie case.[81] The court, in the case of *Lawless v. Calaway,* said:

> "Statutes such as section 2055 are enacted to enable a party to call his adversary and elicit his testimony without making him his own witness. They are remedial in character and should be liberally construed in order to accomplish their purpose."[82]

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78. Johnson v. Winston, 68 Neb. 425, 94 N.W. 607, 609 (1903).

79. Tadlock v. Lloyd, 65 Colo. 40, 173 Pac. 200 (1918).

80. Slimak v. Foster, 106 Conn. 366, 138 Atl. 153 (1927).

81. Seneris v. Haas, 291 P.2d 915 (Cal. 1955); McCurdy v. Hatfield, 30 Cal. 2d 492, 183 P.2d 269 (1947); Lawless v. Calaway, 24 Cal. 2d 81, 147 P.2d 604 (1944); Anderson v. Stump, 42 Cal. App. 2d 761, 209 P.2d 1027 (1941).

82. 24 Cal. 2d 81, 147 P.2d 604, 608 (1944).

The court goes on to say:

> "It is well settled that a plaintiff in a malpractice action can establish his case by the testimony of the defendant therein. It is equally well settled that expert testimony is ordinarily required to prove the material or relevant issues in an action for malpractice. Neither the letter nor spirit of the statute suggest any reason why the defendant in such an action should not be examined with regard to the standard of skill and care ordinarily exercised by doctors in the community under like circumstances and with respect to whether his conduct conformed thereto. We are of the opinion that such examination should be permitted under section 2055 even though it calls for expert testimony."[83]

As a further means of aiding plaintiffs in these cases some courts have apparently extended the concept of "common knowledge" thereby broadening the range of cases not requiring expert testimony.[84] Thus a recent California case, not a malpractice action, permitted the plaintiff to testify as to "objective symptoms" that two tendons of his left hand had been severed by an injury inflicted by the defendant and it was unnecessary to call an expert to establish this fact.[85] In a recent case involving the obvious negligent treatment of a woman in childbirth the United States Court of Appeals for the District of Columbia in holding that the jury was free to ignore the testimony of the defendant expert witnesses said "the jury did not and was not required to accept this somewhat startling statement."[86] Apparently motivated by the same considerations Justice Wolfe of the Supreme Court of Utah, in a concurring opinion in *Edwards v. Clark,* said:

> "if the opinions of the doctors who testified as to the defendant's conduct that it was in conformity with the usual skillful practice under the condition of this case in their community, appear to the layman to put that practice in that community on too low a level, the judicial finding of that fact must rest with the jury and not with this court."[87]

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83. *Id.* at 609.

84. Regan, *Malpractice Suits—The Rising Tide,* 64 CAL. & WEST. MEDICINE 69 (1946).

85. Herman v. Glasscock, 68 Cal. App. 2d 98, 155 P.2d 912 (1945); The objective symptoms to which the plaintiff was permitted to testify were: (1) The ugly wound; (2) Surgery requiring 16 stitches; (3) Resultant pain; (4) Protracted stiffness for 2 years after the assault.

86. Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953). The Court said, "Despite the undisputed evidence that Mrs. Marshall was without the care of a physician after about 9:00 or 9:30 o'clock, although doctors both in and out of the hospital were available; despite the uncontroverted evidence of the hazardous journey to the delivery room with the baby's head already protruding, the practically unassisted move from the cart to the delivery table, the unattended precipitous delivery, and the fall of the baby upon the rubber mat on the metal table—despite all this, Drs. O'Donnell, Parks and Packer, testifying for the hospital, said, in effect, the hospital's physicians and the nurses acted in accordance with good and accepted standards of hospital service in the District of Columbia at that time."

87. 96 Utah 121, 83 P.2d 1021, 1030 (1938).

This extension of the concept of common knowledge has been criticized by the medical profession as indicating that the trend in malpractice cases is against the physician.[88] The broadening of this concept has also been criticized by the courts. The Supreme Court of New Hampshire has said:

> "we are aware of the force of the argument that the difficulty in getting medical testimony in malpractice cases sometimes results in injustices and should make courts more lenient in their requirements as to expert testimony. However, we do not believe that the way to correct one evil is by creating another and permitting juries to reach verdicts by a speculative process which would be peculiarly apt to produce miscarriages of justice. Whether the remedy for such difficulty as may exist should lie within the profession itself or in the legislative action is not for us to say, but in any event, we do not believe the courts should pervert a sound legal principle to reach a result which may be desirable in a particular case."[89]

Coincident with the extension of the concept of common knowledge we find the courts extending the doctrine of res ipsa loquitur in malpractice actions. The usual requirements for the application of the res ipsa loquitur doctrine are: (1) it must be an occurrence which ordinarily does not happen in the absence of someone's negligence; (2) it must be caused by an instrumentality within the defendant's exclusive control; and (3) it must not have been due to any voluntary action or contribution by the plaintiff.[90]

In *Ybarra v. Spangard*,[91] the plaintiff received an injury to his shoulder during the course of an appendectomy. The plaintiff brought suit against all those who had any control over his movements during the course of the operation and while he was under the anesthesia. The California Supreme Court, after recognizing the usual requirements for the application of the res ipsa loquitur doctrine, rendered a judgment against all the defendants saying, "there can be no justification for the rejection of the doctrine in the instant case . . . if we accept the contention of the defendants herein, there will rarely be any compensation for patients injured while unconscious."[92]

However, the California courts have been careful in their application of the principle of the *Ybarra* case. This is illustrated in the very recent case of *Leonard v. Watsonville Community Hospital*,[93] in which the court refused to expand the rule of the *Ybarra* case. In this case action was brought by a patient in whose abdomen a clamp had been left during an

88. Regan, *Malpractice Suits—The Rising Tide*, 64 CAL. & WEST. MEDICINE, 69 (1946).

89. Beane v. Perley, 109 A.2d 848, 850 (N.H. 1954).

90. PROSSER, TORTS § 42 (2d ed. 1955).

91. 25 Cal. 2d 486, 154 P.2d 687 (1945).

92. *Supra* note 91 at 691.

93. 291 P.2d 496 (Cal. 1956).

operation. The plaintiff joined as defendants, the hospital, three surgeons, the anesthetist and the surgical nurse. A nonsuit was granted as to one of the surgeons, the hospital, the anesthetist and the surgical nurse and the suit was settled by the remaining two surgeons. An appeal was taken as to the nonsuit to the one surgeon. The court in affirming the nonsuit said, "the rule of the *Ybarra* case . . . should not be indiscriminately applied in a case where the injury to the plaintiff clearly points to the responsibility of specific defendants."[94] The court pointed out that the surgeon to whom the nonsuit was granted had not used the particular type clamp found inside the plaintiff's abdomen in conducting his part of the operation.

It has also been suggested that the unwillingness of the physicians to testify has moved the courts to liberalize the application of the rule allowing a licensee of one school of medicine to testify as to the conduct of a person licensed in another school of medicine.[95]

C.

By the Legislatures.

A few states have seen fit to legislate, either directly or indirectly, on this question. The Massachusetts Legislature has enacted a statute which permits the introduction, at the discretion of the court, of textbooks, treatises and articles written and published by a recognized expert as a substitute for oral expert testimony provided that adequate notice of the intention to introduce this evidence is given to the defendant's counsel.[96] Alabama, while having no statute on the subject permits the introduction of medical texts to prove the truth of the matter therein.[97]

Rhode Island has a statute providing for the use of neutral experts.[98] The statute provides for the appointment by the court, upon the motion of either party at any time before the trial, of disinterested skilled persons who may be residents or non-residents to act as expert witnesses.

Finally, Wisconsin has dealt squarely with the problem thru the enactment of the statute previously mentioned.[99]

VI.

WHAT COULD AND SHOULD BE DONE?

The use of the subpoena has been suggested as a means of getting expert medical testimony before the courts in malpractice actions.[100] The

94. *Supra* note 93 at 500.

95. Note, 1952 WIS. L. REV. 567.

96. MASS. ANN. LAWS c. 183 §1 (1949). For two cases interpreting the statute see Thomas v. Ellis, 329 Mass. 93, 106 N.E. 2d 687 (1952); Murawski v. Laird, 330 Mass. 599, 116 N.E. 2d 279 (1953). Nevada has a similar statute, NEV. STAT. 1953, Mar. 13, c. 100 § 1.

97. Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

98. R.I. GEN. LAWS c. 342, § 18 (1923).

99. See note 37 *supra*.

100. See note 44 *supra*.

great practical difficulties involved would hamper the effective use of such a device. The plaintiff's attorney in making use of the subpoena to procure an expert might well find himself in a precarious position. This is sharply brought out in *Edwards v. Clark*,[101] where the plaintiff called three expert witnesses and the Supreme Court of Utah in speaking of their testimony said:

> "Their testimony was certainly not helpful to the plaintiff's cause. Quite the contrary. Yet they were the plaintiff's witnesses, called by them on their behalf. Neither the court nor the opposing parties could be justly blamed because a witness turns out to be either reluctant or adverse. The record disclosed that the testimony of these witnesses, rendered them certainly better witnesses for the defendant."

This case is more striking when we realize that the witnesses referred to in the above quote were not testifying under a subpoena. Besides the practical difficulties encountered in the use of the subpoena there are other difficulties present, not the least of which is that some states expressly forbid the forceful solicitation of expert testimony.[102]

As a further means of promoting understanding among the professions the suggestion has been made that courses in legal medicine be given in medical schools. In an article appearing in the Journal of the American Medical Association it is pointed out that at present there are only twelve medical schools in the United States which have required courses in legal medicine.[103]

Mr. George Hall, of the Law Department of the American Medical Association, in an article discussing the terror manifested by physicians who called the Law Department for advice concerning their testimony in malpractice cases says:

> "the point I wish to make is this. The law schools are doing their best to teach lawyers how to utilize to their advantage everything that medicine, and science in general, has to offer them. Medical schools can do no less. Physicians must be taught what the law has in store for them, both the pros and the cons of it."[104]

VII.

CONCLUSION.

The answer to this problem must come ultimately from the professions themselves. Undoubtedly the real problem lies in the lack of understanding

101. 96 Utah 121, 83 P.2d 1021, 1023, 1024 (1938).

102. Stanton v. Rushmore, 112 N.J.L. 115, 169 Atl. 721 (1934); Kraushaar Bros. & Co. v. Thorpe, 296 N.Y. 224, 72 N.E.2d 165 (1947).

103. Levinson, *Teaching Legal Medicine in the Undergraduate Medical Curriculum*, 159 A.M.A.J. 1718 (1955).

104. Hall, *The Physician and the Law*, 158 A.M.A.J. 257 (1955).

between the professions. Therefore the only sound solution is in the education of the professions toward a greater appreciation of each other's problems. Pious utterances such as these abound in the literature on the subject. However, these solemn phrases are slowly being supported by affirmative action. The medicolegal symposiums and the establishment of medicolegal organizations are serving to promote the necessary understanding among the professions.

Dr. Elmer Hess, President of the American Medical Association, in opening the recent medicolegal symposiums struck the keynote for any future discussions between the professions when he said that the meetings were planned and conducted with the idea that "the ripple of understanding they create will spread through the professions, eventually clearing the sometimes muddy medicolegal waters."[105]

Francis R. O'Hara

105. 159 A.M.A.J. 1638 (1955).